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No. 87-1665

Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1987

— o —
IN RE CASSIDY LAND
AND CATTLE COMPANY, INC.,
Debtor,

McCARTY RANCH TRUST, *et al.*,
Petitioners,

v.

ROBERT F. CRAIG, TRUSTEE OF
CASSIDY LAND AND CATTLE COMPANY, INC.,
Respondent.

— o —
**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT**

— o —
**BRIEF OF RESPONDENT ROBERT F. CRAIG
IN OPPOSITION**

— o —
DAVID D. BEGLEY
KENNEDY, HOLLAND, DELACY & SVOBODA
10306 Regency Parkway Drive
Omaha, Nebraska 68114
(402) 397-0203

Attorney for the Respondent

QUESTION PRESENTED

Should this Court grant certiorari for a case in which the lower court did not need to decide a constitutional issue and correctly decided the case on statutory grounds?

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The respondent, Robert F. Craig, respectfully requests
that this Court deny the petition for a writ of certiorari.

REASONS WHY CERTIORARI SHOULD BE DENIED

While petitioner attempts to cast this case as one
representative of a multitude of bankruptcy cases which
involve debtors who are forced into bankruptcy due to a

creditor's filing of a mortgage foreclosure action, such characterization is totally inaccurate. Petition for a writ of certiorari, at 7, *In re Cassidy Land and Cattle Co., Inc.*, No. 87-1665. The simple fact is that the case below was the reverse of the typical situation as was specifically noted by the Eighth Circuit and involving nothing more than a trustee's going about the duties of collecting up the assets of a bankruptcy estate for distribution to creditors.

In this case, the only assets of any significance which belonged to the estate were two promissory notes secured by mortgages on approximately 12,500 acres of Nebraska ranch land which had, until approximately six months before the case was filed, belonged to the debtor. Shortly after his appointment, the trustee initiated actions in the United States District Court seeking to recover the ranch land as having been fraudulently conveyed to trusts established for the benefit of the debtor and the debtor's principals in an attempt to remove the 12,500 acres of ranch land from the estate and the claims of creditors. The alternative theories of recovery were that those transfers were in consideration of the notes and mortgages received by the debtor which would then be subject to foreclosure. The case presented to the court was, alternatively, either a classic turnover proceeding under 11 U.S.C. § 542(b) dealing with a mature debt or a fraudulent conveyance subject to avoidance under 11 U.S.C. § 548.

Contrary to petitioner's suggestion that this case presents legal relationships identical to those which were before this Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) the instant case involved stipulated facts establishing the debtor-creditor relationship between the plaintiff and the defen-

dant, the maturity of the debt, the validity of the mortgages and the amounts due. There was no need for the court to make any adjudications of state law issues other than the core bankruptcy function of adjusting debtor-creditor rights.

1. The case is not of national importance.

The Eighth Circuit decided this case on the narrow grounds that the bankruptcy court had jurisdiction pursuant to 28 U.S.C. § 157(b)(2)(E) to conduct a mortgage foreclosure action. The circuit court was careful to limit its holding to the unique facts of this case. *In re Cassidy Land and Cattle Co., Inc.*, 836 F.2d 1130, 1132 (8th Cir. 1988). There was no comprehensive interpretation of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 ("the 1984 Amendments"). *Id.* Because there was no comprehensive construction of the 1984 Amendments to the Bankruptcy Code, but only a narrow interpretation of 28 U.S.C. § 157(b)(2)(E), this case does not present an issue of national importance.

The lower court declined to make a comprehensive constitutional review of the 1984 Amendments as there was no need to do so. First, the case presented only one simple statutory issue regarding the turnover powers of the trustee. The lower court easily concluded that the turnover authority of the trustee encompassed the mortgage foreclosure lawsuit and was within the bankruptcy court's proper jurisdiction. *Id.* at 1133. Secondly, it is a well recognized rule of law that "[f]ederal statutes are to be so construed as to avoid serious doubt of their constitutionality." *International Association of Machinists v. Street*, 367 U.S. 740, 749 (1961). Given the fact that an

action for an order “to turnover property of the estate” is well within the traditional jurisdiction of a bankruptcy court, there was no need for the court of appeals to find 28 U.S.C. § 157(b)(2)(E) unconstitutional.

2. The court of appeal’s decision is not in conflict with this Court’s decision in Northern Pipeline.

Initially it should be recognized that the trustee’s action seeking a turnover order for assets of the estate would have passed constitutional scrutiny prior to passage of The Bankruptcy Act of 1978, Pub. L. 95-598, 92 Stat. 2549, and the 1984 Amendments. In *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 481 (1940) it was stated, “Bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession.” An action for a turning over of property of the estate, already within the constructive possession of the bankruptcy court, was clearly within the traditional bankruptcy court jurisdiction prior to the enactment of The Bankruptcy Act of 1978.

28 U.S.C. § 1471 (e), prior to the 1984 Amendments, gave the bankruptcy court exclusive jurisdiction over all property of the debtor. “Property of the debtor” would include mortgages owned by the debtor (now property of the estate) and in need of collection by the trustee’s foreclosure action.

Consequently since the Eighth Circuit’s decision would have been correct both before and after *Northern Pipeline* was decided, there is no need to consider this case for review because it would require reversal of settled law.

In a post-1984 Amendments world the *Cassidy* decision is still correctly decided. The answer lies in the historic jurisdiction of the bankruptcy court when compared to the facts of this case.

Congress' response to *Northern Pipeline* was the 1984 Amendments. The legislative history, and the terms used within the statute, reflect Congress' intentions to craft a statute mirroring the Court's language in *Northern Pipeline*.

For example, 28 U.S.C. § 157 uses the terms "core" and "non-core" as the dividing mechanism between those actions which are within the traditional bankruptcy court jurisdiction and those which may be submitted to the district court for judgment. See 28 U.S.C. § 157(d). The source of the use of the terms "core" and "non-core" is the plurality's decision in *Northern Pipeline*. In *Northern Pipeline* Justice Brennan ruled that, "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights. . . ." 458 U.S. at 71.

Congress was acutely aware of this Court's decision in *Northern Pipeline* when drafting the 1984 amendments. One of the bill's co-sponsors identified core proceedings as those "integral to the core bankruptcy function of restructuring debtor-creditor rights. . . ." 130 Cong. Rec. E1109 (daily ed. March 20, 1984) (statement of Rep. Kastenmeier). The non-core type lawsuits were identified in debate as being "Marathon-type suits" "concerned only with State law issues that did not arise from the core bankruptcy function of adjusting debtor-creditor rights." 130 Cong. Rec. H1848 (daily ed. March 21, 1984) (state-

ment of Rep. Kindness). Congress, therefore, in drafting the 1984 Amendments was following the Court's distinction between the type of lawsuits which can be adjudicated by Article I bankruptcy judges and those which must be decided by Article III judges.

In *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985) and *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 106 S.Ct. 3245, 92 L.Ed. 2d 675 (1986) this Court had further opportunity to explain the scope of its holding in *Northern Pipeline*. *Thomas* instructs that *Northern Pipeline* simply means that Congress may not vest in a non-Article III court the power to adjudicate traditional state law cases. 473 U.S. at 584. *Schor* viewed *Northern Pipeline* as an example of the application of a balancing test for analysis of Article III issues. The *Schor* court also considered the historic jurisdiction of Article III courts to have an important bearing on whether a particular matter may be decided by someone other than an Article III judge. 92 L.Ed. 2d at 695.

The conclusion that can be drawn from *Northern Pipeline*, *Schor*, *Thomas* and such lower court cases as *In re Wood*, 825 F.2d 90 (5th Cir. 1987) and *In re Arnold Printworks, Inc.*, 815 F.2d 165 (1st Cir. 1987) is that the focus of the constitutional analysis should be on the nature of the bankruptcy adversary proceeding. If the lawsuit involves adjudication of the peculiar rights attendant with the filing of a bankruptcy petition, then a bankruptcy court has the constitutional jurisdiction to decide the case.

There can be no doubt that collection of property of the estate is a fundamental aspect of the restructuring of the debtor-creditor relationship. As such, any turnover proceeding commenced by the trustee pursuant to 28

U.S.C. § 157(b)(2)(E) is properly a “core proceeding.” Therefore, the bankruptcy court had jurisdiction to permit the trustee to collect property of the bankruptcy estate within the meaning of 11 U.S.C. § 542(b).

As an aside, it should be noted that lower courts that have comprehensively examined the constitutionality of the 1984 Amendments have found it constitutional. *In re Earle Industries, Inc.*, 71 B.R. 919, 925 (Bankr. E.D. Pa. 1987). *In re Production Steel, Inc.*, 48 B.R. 841, 846 (M.D. Tenn. 1985); *In re Tom Carter Enterprises, Inc.*, 44 B.R. 605, 609 (C.D. Cal. 1984).

3. 28 U.S.C. § 157 is not a jurisdictional statute, but one of procedure, whose constitutionality was not timely challenged and properly appealed.

A fatal flaw to the petitioner’s case is that she did not timely raise her claim of the unconstitutionality of 28 U.S.C. § 157(b)(2). The summary judgment granting the mortgage foreclosure was March 12, 1985. Petitioner filed a Fed. R. Civ. P. 60(b)(4) motion to void the judgment based upon the bankruptcy court’s purported lack of jurisdiction almost one year later. Petition for writ of certiorari, at 5, *In re Cassidy Land and Cattle Co., Inc.*, No. 87-1665. The only way this late collateral attack against the judgment would be permissible is if the summary judgment was void for lack of jurisdiction.

The petitioner’s argument was, and is, that 28 U.S.C. § 157(b)(2) is unconstitutional because it vests jurisdiction to collect assets of the estate in the bankruptcy court. The problem with the argument is that 28 U.S.C. § 157(b)(2)

is a statute of procedure and not of jurisdiction.¹ 28 U.S.C. § 1334 is the jurisdictional statute. It generally provides that the district court has, "original but not exclusive jurisdiction of all civil proceedings arising under title 11 . . ." *Id.* at (b). Therefore the petitioner had to challenge the constitutionality of the procedural statute (28 U.S.C. § 157) within thirty days of March 12, 1985 or be forever barred from raising the issue. *Yakus v. United States*, 321 U.S. 414, 444 (1944); Fed. R. App. P. 4; 16 C.J.S. *Constitutional Law* § 93.

Admittedly the jurisdictional qualifications of a lower federal court is always subject to review by this Court. *Chicago B. & Q. Ry. Co. v. Willard*, 220 U.S. 413, 419 (1911). However, as long as the questioned statute does not on its face deal with jurisdiction, its constitutionality must be raised at the first opportunity by the pleadings in the lower court and be preserved by a timely appeal; not collaterally attacked one year after judgment. *See Stenbridge v. Georgia*, 343 U.S. 541, 544 (1952).

It is further submitted that the petitioner has waived any right to challenge the constitutionality of 28 U.S.C. § 157 as a jurisdictional statute. *Schor* controls. In *Schor* customers of a commodity futures broker filed a repara-

¹28 U.S.C. § 157 is procedural because the district court may refer title 11 cases to its adjunct the bankruptcy court. 28 U.S.C. §§ 151, 157(a). The district court may withdraw the case or proceeding from the bankruptcy court. 28 U.S.C. § 157(d). *See In re Associated Grocers of Neb. Coop., Inc.*, 62 B.R. 439 (D. Neb. 1986). The whole scheme of 28 U.S.C. § 157 deals with how the district court having original jurisdiction shall handle the procedure of which cases it may hear or which cases its adjunct, the bankruptcy court, may hear.

tions proceeding with the Commodity Futures Trading Commission. The customers later objected to the adjudication of state law counterclaims by an administrative agency whose officers were not Article III judges. The objection was raised, however, after the customers had already received the decision of the administrative law judge. 92 L.Ed.2d at 684. The Court found this conduct to be an indisputable waiver of any right to trial before an Article III court. *Id.* at 691.

In the case at bar petitioner sought and received a nine month stay from sale of the foreclosed property. Neb. Rev. Stat. § 25-1506 (Reissue of 1985); Appendix. This affirmative benefit conferred upon the petitioner prevents her from later claiming that the bankruptcy court was without constitutional jurisdiction to decide the case. If the petitioner had truly desired to raise and preserve her constitutional objections to the bankruptcy court's jurisdiction she would not have requested the stay.

4. There is no conflict among the circuits as to the constitutionality of 28 U.S.C. § 157(b)(2)(E).

Petitioner states that *In re Wood* and *In re Arnold Printworks, Inc.* present conflicting constructions of 28 U.S.C. § 157 with the case at bar. The statement is wrong.

In re Wood is distinguishable based upon its facts. In *Wood* the plaintiff sued the debtor for wrongfully issuing additional shares of stock. The plaintiff alleged that he and the defendant had an agreement to be equal shareholders in a professional corporation. 825 F.2d at 91. The cause of action was essentially for an accounting or unjust enrichment.

The Fifth Circuit correctly held that the action was a non-core proceeding because the lawsuit did not invoke any substantive rights provided by Title 11. *Id.* at 97.

The plaintiff in *Wood*, unlike the respondent in the case at bar, was not attempting to collect property of the bankruptcy estate. Hence there is no similarity between the case at bar and *Wood*.

In re Arnold Printworks, Inc. held that a lawsuit to collect post-petition damages arising from the sale of the debtor's equipment was a core case because it involved the administration of the estate. 815 F.2d at 167. The jurisdictional basis of the First Circuit's decision was 28 U.S.C. § 157(b)(2)(A).

Neither *Wood* or *Arnold Printworks, Inc.* construed the same statute that the Eighth Circuit did in the case below. For that reason there is no conflict among the courts of appeal.

5. The petitioner has failed to comply with the rules of this Court.

The petitioner makes an ostensible claim of the unconstitutionality of 28 U.S.C. § 157(b)(2). Supreme Court Rule 28.4(b) requires that the petitioner's initial pleading cite 28 U.S.C. § 2403(a) and that there be service of the brief upon the Solicitor General. Neither of these requirements has been fulfilled.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID D. BEGLEY
KENNEDY, HOLLAND, DELACY & SVOBODA
10306 Regency Parkway Drive
Omaha, Nebraska 68114
(402) 397-0203

Attorney for Respondent



APPENDIX

IN THE UNITED STATES
BANKRUPTCY COURT ASKA [sic]
FOR THE DISTRICT OF NEBRASKA

ROBERT F. CRAIG, Trustee of)	CASE NO.
Cassidy Land & Cattle Co., Inc.)	BK 82-1257
)	A 83-483
Plaintiff,)	
)	MOTION
vs.)	TO STAY
)	
McCARTY RANCH TRUST, et al,)	
)	
Defendants.)	

Comes now the Defendant, McCarty Ranch Trust, and request the order of sale of the mortgaged premises be stayed for nine months from the date of the decree entered herein as provided by § 25-1506 R.R.S. Neb. 1943.

McCARTY RANCH TRUST,
Defendant,

By /s/ E. Dean Hascall
11736
Attorney for the Defendants
101 W. Mission Avenue
Bellevue NE 68005
(402) 291-8900
